

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX**

CLARVIEW NURSING AND REHABILITATION
CENTER¹

Employer

and

Case 6-RC-12485

DISTRICT 1199P, SERVICE EMPLOYEES
INTERNATIONAL UNION²

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Clarview Nursing and Rehabilitation Center, operates a long term nursing facility in Sligo, Pennsylvania, herein called the Employer's facility, where it employs approximately 114 employees.³ The Petitioner, District 1199P, Service Employees International Union, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all full-time and regular part-time licensed practical nurses, herein called LPNs, excluding all other employees including guards and supervisors as defined in the Act. A hearing officer of the Board held a hearing and the parties filed timely briefs with me.

¹ The name of the Employer appears as amended at the hearing.

² Although the petition stated the name of the Union as SEIU, District 1199P, I am referring to it herein by its correct name.

³ The Employer's facility is managed by Extendicare Health Services, Inc., a Delaware corporation. However, the Employer is a Pennsylvania corporation and Extendicare has no ownership interest in it. The Administrator and the Director of Nursing are employees of Extendicare; all of the rest of the employees at the Employer's facility are employees of the Employer.

As evidenced at the hearing and in the briefs, the parties disagree on the supervisory status of the LPNs. The Employer contends that the LPNs are supervisors within the meaning of the Act and that the petition should be dismissed, while the Petitioner contends that the LPNs neither possess nor exercise any supervisory authority. The unit sought by the Petitioner has approximately 23 employees.⁴

I have considered the evidence and the arguments presented by the parties on the issue. As discussed below, I have concluded that the LPNs at the Employer's facility are not supervisors within the meaning of the Act. Accordingly, I have directed an election in a unit that consists of approximately 23 employees.

To provide a context for my discussion of the issues, I will first provide an overview of the Employer's operations. Then, I will present in detail the facts and reasoning that supports my conclusion on the issue.

I. OVERVIEW OF OPERATIONS

The Employer operates a long term nursing home and rehabilitation facility, which can accommodate a maximum of 120 residents, most of whom are elderly.⁵ The facility is divided into two identical wings, with 60 beds on each. Each wing, designated as A-wing and B-wing, has a nurses' station, a lounge and two bathing areas. The building is shaped like the letter "H", with the two wings perpendicular to the center hall. The center hallway houses the main

⁴ At the hearing, the parties stipulated, and I find, that four LPNs are supervisors within the meaning of Section 2(11) of the Act. Specifically, the parties stipulated that Lisa Bowers, Restorative Nursing/Medical Records Coordinator; Stephanie Ginnery, Nursing Unit Coordinator (herein "NUC"); Sharon Downs, Assistant Manager of Country Springs Assisted Living facility; and Marsha Murphy, LPN, have the authority, inter alia, to assign and direct work using independent judgment within the meaning of the Act, and therefore are excluded from the unit found appropriate herein. Additionally, the parties stipulated that LPN Robin Stansberry, Social Services Assistant, should be excluded from the unit because she lacks a community of interest with the employees in the petitioned-for unit. It appears that other than the individuals named herein and the 23 LPNs in the petitioned-for unit, there are no other LPNs employed at the Employer's facility.

⁵ Inasmuch as the record reflects that the Employer's operation is a nursing facility devoted to the care of sick, infirm and aged persons, I find that the Employer is a health care institution within the meaning of Section 2(14) of the Act.

entrance, conference room, and the administrative and business offices. Behind the office area are the kitchen, dining room, employee lounge, housekeeping and laundry departments, maintenance department and storage areas. At the end of one of the wings, there is an area that houses the therapy department, including speech, physical, occupational, modality, and respiratory therapy. The facility is a one story building.

The overall operations of the Employer are the responsibility of its Administrator, Gale Owen. Reporting directly to the Administrator are various department heads, including Ronald "Scott" Jordan, Director of Nursing ("DON"); Melissa Bobbert, Director of Social Services; Sue Deitz, Supervisor of Housekeeping and Laundry and Safety Coordinator; Lori Craig, Business Office Manager; David McCormack, Director of Maintenance; Janice Bailey, Dietary Manager; Darlene David, Activities Coordinator;⁶ Melinda Gatesman, Referral Manager;⁷ and Terry Sattely, Country Springs Manager.⁸ These department heads and the administrator generally work either from 8 a.m. to 4 p.m. or from 9 a.m. to 5 p.m. daily.

DON Jordan is responsible for the operation of the Nursing Department, which handles the direct care of the residents. Assisting the DON in the overall responsibility for this department is Assistant Director of Nursing ("ADON") Myrtle McClure. DON Jordan, ADON McClure, NUC Ginnery, Restorative Nursing/Medical Records Coordinator Bowser, as well as the Staff Development Coordinator, Registered Nurse ("RN") Jean Smith, all work daylight hours. There are approximately 17 RNs employed at the facility who hold the position of RN

⁶ The Activities Coordinator's last name is spelled "David" on the Employer's organizational chart, but she is referred to as Darlene "Davis" by the DON in his testimony.

⁷ Gatesman is also referred to as the Director of Admissions.

⁸ The parties stipulated, and I find, that Melinda Gatesman is a managerial employee. The parties also stipulated, and I find, that Melissa Bobbert, Lori Craig, and Darlene David (or Davis) are supervisors within the meaning of Section 2(11) of the Act. Further, although the parties did not stipulate, I find that DON Jordan is a supervisor within the meaning of Section 2(11) of the Act inasmuch as he has the authority, inter alia, to discipline and to assign work to employees. With regard to Sue Dietz, Supervisor of Housekeeping and Laundry and Safety Coordinator; David McCormack, Director of Maintenance; Janice Bailey, Dietary Manager; and Terry Sattely, Country Springs Manager, the record does not provide information sufficient to make a finding as to their supervisory or managerial status.

Supervisor.⁹ Additionally, there are approximately 24 LPNs and 63 Certified Nursing Assistants (“CNAs”) who provide the direct patient care.

The employees in the Nursing Department work three shifts: from 7 a.m. to 3 p.m. (daylight shift), from 3 p.m. to 11 p.m. (afternoon shift), and from 11 p.m. to 7 a.m. (night shift), seven days per week. The Employer has a sliding requirement for the number of employees in each classification required to be present for each shift, depending on the number of residents living at the facility on that day. Thus, when the facility is at full capacity, on daylight shift, each wing must have one RN Supervisor, two LPNs, six CNAs, plus one CNA bath aide and two CNA restorative aides. From Monday through Friday, there is also a Wound Care LPN on the daylight shift. On the afternoon shift, the facility has one RN Supervisor, and each wing must have two LPNs, five CNAs and one CNA who “floats” between the two units. On the night shift, the facility has one RN Supervisor, and each wing has one LPN and two CNAs.

The RN Supervisors are responsible for the overall day-to-day operation of the resident wings. The RNs assess new patients as they are admitted. They have direct communication with the physicians and transmit the physicians’ orders to the LPNs on the wings. The RNs also plan the patient care and direct the LPNs with regard to any changes in such care. The RNs perform the evaluations of the LPNs who work under them. They also instruct the LPNs to issue and often sign off on any discipline given to a CNA.

The CNAs provide the direct patient care to the residents, including positioning, providing trays of food, snacks and hydration, bathing, dressing, grooming, taking vital signs and so forth. They also transport residents to the dining room and assist them with their meals. There are certain other chores that are routinely assigned to the CNAs, including cleaning the utility room, carpet and front hall, and keeping the supply room in order. Each CNA is assigned to a group of rooms for which they are responsible during the shift. This assignment rarely

⁹ Based on the record evidence, I find that the RN Supervisors are supervisors within the meaning of Section 2(11) of the Act inasmuch as they have the authority, inter alia, to discipline employees and to assign and direct the work of employees.

changes, unless the census changes or the CNA is required to fill in for another CNA who is absent. They are also assigned a certain time to take two 15-minute breaks and a one half-hour meal during the shift.¹⁰ The Employer maintains detailed policies as to how the CNAs' work duties are to be performed, which are kept at the nurses' stations.

The LPNs receive a staffing sheet for their wing each morning that is prepared by NUC Ginnery. This sheet has the names of the CNAs who are to work with the LPNs on the wing during each shift. The staffing sheet is provided to the LPNs on the daylight shift, and is kept on a clipboard at the nurse's station for the 24-hour period. On daylight and afternoon shifts, the LPNs generally divide the number of rooms containing residents on the wing equally among the CNAs on duty that shift. On those shifts, the CNAs generally have the same room assignments each day. On night shift, the CNAs work in pairs to service all of the rooms as a team.¹¹ Likewise, the breaks and meal times are assigned according to the room assignment the CNA has been given.

However, if a situation arises relating to patient care, the CNA may be asked to assist with the care of a particular resident in addition to their regular duties. Generally, if a CNA cannot take the break when it is assigned because of some problem being dealt with regarding resident care, the CNAs may decide among themselves to move around the break times and inform the LPN when that has been arranged. Other times, the LPN might request that the CNAs adjust their break times because of some extraordinary situation that has arisen. The LPN may or may not write the change on the staffing sheet.

When the shift begins, the CNAs from the previous shift are required to stay until it is clear that there are enough CNAs to staff the new shift. If there are not enough CNAs for the shift that is about to start, the LPN calls the RN Supervisor, who decides how the positions

¹⁰ The CNAs are represented by AFSCME and work under the terms of a collective-bargaining agreement.

¹¹ The residents are, for the most part, asleep during the night shift.

needed will be filled.¹² The LPNs play no part in deciding who should act as a substitute CNA, and have no role in finding a substitute for the shift. The CNAs who are arriving consult with the CNAs who are leaving to find out if there are any particular problems or issues they need to recognize. This consultation is called a “walking report”. Similarly, the LPNs coming on duty meet with the LPNs who are leaving to get a report on the residents on the wing, and discuss any changes in the conditions of the residents.

Once the staffing issues have been resolved on the wing, the LPNs inform the CNAs of any changes in the conditions of the residents, or if there are any unusual treatments or appointments for the residents. When there are changes in the routine, the LPN may have to adjust the assignments of the CNAs. For example, if a resident has become ill, the resident may need extra care from the CNAs. Additionally, an inexperienced CNA might be called in from a temporary agency, and the room assignments might have to be adjusted to accommodate the CNA's lack of experience.

After the LPNs and CNAs receive the information from the outgoing employees, the CNAs begin their care of the residents. The LPNs complete the assignment sheet and then begin to pass medications to the residents. In addition, the LPNs provide certain treatments to the residents, including skin assessments and wound treatments. The LPNs also assist the CNAs in the care of residents, working together to feed, reposition or prepare the resident for bed. The LPNs are responsible for recording the vital signs that are taken either by the LPNs or by the CNAs. In addition, the LPNs are expected to keep certain documents, including keeping the patient charts up to date, documenting forms for Medicare and Medicaid, and transcribing physicians' orders that are provided to them from the RN Supervisor.

The LPNs are responsible for the quality of the patient care on the wing on which they work. If an LPN observes a problem wherein a CNA has not performed the work correctly, or

¹² The RN may call CNAs from a list of casuals and part-time employees, or may instruct the LPN on the wing to solicit volunteers to work overtime. If this does not solve the problem, the RN may mandate overtime to the CNAs so that the staffing level is correct.

failed to perform one of the assigned duties, the LPN will verbally instruct the CNA to correct the problem. The LPNs do not formally inspect the work of the CNAs on a regular basis; rather, they observe the condition of the residents as the LPNs pass medications or perform wound or other kinds of care. If a disagreement occurs between two CNAs, or if one CNA has a complaint about the working conditions, the LPN may listen to the problem and assist in resolving it. However, grievances, whether formal or informal, generally are referred by the LPNs to the RN Supervisor for resolution.

Around the anniversary date of each CNA, the NUC provides an evaluation form to the LPN who works with that CNA. NUC Ginnery fills in the attendance information about the CNA. The LPN then rates the employee in various areas, such as grooming, punctuality, communication, cooperation, quantity and quality of work, and so forth. There is also an opportunity for the LPN to write comments in narrative form. After the LPN fills it in, the evaluation is turned in to the DON. Sometimes, the evaluation form is returned to the LPN to make changes desired by the DON. After the LPN completes the final version of the evaluation, the LPN meets with the CNA, and they review the evaluation together. There is no evidence that the annual evaluation has any effect on the wages or future employment of the individual employee.

The Employer has a formal discipline system that is set forth in its policies and its employee handbook. LPNs may verbally counsel a CNA if the LPN observes a problem with the CNA's conduct or work performance, but such counseling is not recorded and is not part of any formal disciplinary policy. Likewise, the LPN may sign a "Coaching/Counseling Report", which records the observation of a problem but also is not a part of the Employer's formal disciplinary system. Most often, if the LPN observes a problem, he or she will discuss the matter with the RN Supervisor. The RN makes a decision as to whether the LPN should verbally discuss the matter with the CNA if that has not yet occurred, whether the LPN should issue a coaching/counseling report, or whether a step in the formal discipline system should be administered.

If the RN decides that formal discipline should be issued, the RN checks the individual's personnel records to determine if the CNA has received any previous coaching reports or formal discipline. In many cases, the RN or the DON fills in the level of discipline on the form, rather than the LPN. When an LPN fills in the level of discipline, it is at the instruction of the RN or the DON. The RN usually instructs the LPN to fill in the details of the problem, and to sign the discipline form. The form is usually co-signed by the RN or the DON. The LPN or the RN then presents the discipline to the CNA, who is asked to sign the form. The discipline is stored in the individual's personnel file, and a copy is kept in a file cabinet in the RN Supervisors' office.

As situations arise on the resident wings or in the facility generally, the LPN or the RN Supervisor may conduct an "inservice" for the CNAs, or the RN Supervisor may instruct the LPN to conduct one. This often entails either demonstrating the proper technique for performing one of the job duties, or merely giving written instructions as to how to perform a job duty, a change in an existing policy, or the implementation of a new policy. When an inservice is written, it is left at the nurses' station. The LPNs inform the CNAs that the inservice sheet is at the nurses' station and that the CNAs should read it and sign their names on the form. LPNs do not usually conduct an inservice demonstration unless they are instructed to do so by an RN Supervisor.

II. SUPERVISORY STATUS OF THE LPNS

As previously stated, the Employer contends that the LPNs at the Employer's facility are supervisors within the meaning of the Act. In so asserting, the Employer contends that the LPNs have the authority to assign, direct, discipline, evaluate and adjust grievances of the CNAs. The Petitioner, on the other hand, asserts that the shift supervisors are not supervisors within the meaning of the Act even under the analysis required by NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001). As described in more detail below, I find that the Employer has not met its burden of establishing that the LPNs are supervisors within the meaning of the Act, and therefore, I shall include them in the unit found appropriate herein.

Section 2(11) of the Act defines the term supervisor as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of supervisor in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. Ohio Power Co. v. NLRB, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. Harborside Healthcare, Inc., 330 NLRB 1334 (2000).

The burden of proving supervisory status lies with the party asserting that such status exists. NLRB v. Kentucky River Community Care, Inc., supra at 710–712; Michigan Masonic Home, 332 NLRB 1409 (2000). This is a substantial burden in light of the exclusion of supervisors from the protection of the Act. The Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., Vencor Hospital – Los Angeles, 328 NLRB 1136, 1138 (1999); Bozeman Deaconess Hospital, 322 NLRB 1107, 1114 (1997). Lack of evidence is construed against the party asserting supervisory status. Michigan Masonic Home, supra. Mere inferences or conclusory statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory authority. Sears, Roebuck & Co., 304 NLRB 193 (1991).

Moreover, the issue of supervisory status is highly fact-specific and job duties vary; thus, per se rules designating classifications as always or never supervisory are generally inappropriate. Brusco Tug & Barge Co., 247 F.3d 273, 276 (D.C. Cir. 2001).

The Board and the courts have observed that the Act sets forth a three-pronged test for determining whether an individual is a supervisor within the meaning of the Act.

Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,' and (3) their authority is held 'in the interest of the employer'.

Franklin Hospital Medical Center d/b/a Franklin Home Health Agency, 337 NLRB 826, 829 (2002), citing NLRB v. Kentucky River Community Care, Inc., *supra*.

The exercise of "some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner," or through giving "some instructions or minor orders to other employees" does not confer supervisory status. Franklin Hospital Medical Center d/b/a Franklin Home Health Agency, *supra*, citing Chicago Metallic Corp., 273 NLRB 1677, 1689 (1985).

With regard to the use of independent judgment, it is difficult to analyze whether individuals alleged to be supervisors have the authority to responsibly direct employees within the meaning of Section 2(11) of the Act, particularly in the health care field, since the Board, prior to Kentucky River Community Care, Inc., held that employees are not using independent judgment when they utilize ordinary professional judgment in directing less-skilled employees in accordance with employer-specified standards. This view was rejected by the Supreme Court in Kentucky River Community Care, Inc., *supra* at 713, finding that this categorical exclusion was overly broad.

However, the Supreme Court did accept two aspects of the Board's interpretation of independent judgment. First, the Court agreed that the term "independent judgment" is ambiguous, and that many nominally supervisory functions may be performed without such a degree of judgment or discretion as to warrant a finding of supervisory status. Second, the Court found that detailed orders and directions from the employer may reduce the degree of judgment exercised below the statutory threshold for supervisory status. *Id.* at 712–714. The Court allowed that the Board has the discretion to make the determination as to whether the degree of judgment utilized reaches the level of independent judgment sufficient to warrant a finding of supervisory status. *Id.*

The Supreme Court did not find that all nurses are supervisors in Kentucky River Community Care, Inc.. Rather, it left it to the Board to analyze the facts of each individual case to determine whether, in light of the findings in Kentucky River Community Care, Inc., the individuals at issue utilize independent judgment. If the judgment being analyzed is constrained by employer-specified standards, or higher authorities have not delegated power to the individuals to make independent decisions, then the judgment may well be routine and not considered supervisory within the meaning of the Act.

As previously stated, contrary to the Petitioner, the Employer contends that the LPNs at its facility are supervisors because it asserts that they have the authority to assign, responsibly direct employees, discipline, evaluate, and to adjust their grievances.¹³ Upon the entire record, and in light of the direction of Kentucky River Community Care, Inc., I have concluded that the LPNs in this case are not supervisors within the meaning of the Act.

A. Analysis of the Job Description

The job description for LPNs describes the position as LPN/LVN Supervisor.¹⁴ The document states that the LPNs have the following supervisory responsibilities: makes daily work assignments; directs the work of employees; schedules lunch and rest breaks; authorizes early departure from work; authorizes overtime; reassigns employees from one area to another area as facility needs dictate; prepares written evaluations of assigned employees; enforces facility policies with authority to issue Disciplinary Action reports as needed; authority to suspend employees for rules violations; initials time records to authorize variances; interviews applicants that will be assigned to his/her area of responsibility; receives and handles employee

¹³ As previously noted, the Employer does not assert, either through evidence presented at the hearing or through its brief, that the LPNs possess any of the other indicia of supervisory authority enumerated in Section 2(11) of the Act, including the authority to hire, transfer, suspend, lay off, recall, promote, reward or discharge employees. Consequently, I have not discussed those indicia in this decision.

¹⁴ LVN is a title used in other states, but not in Pennsylvania, for licensed nurses.

complaints; and participates in training programs and assists in orientation of new staff. The CNA job description states that they report to “nurse”, but does not specify whether this refers to LPNs or RNs.

It is well settled that employees cannot be transformed into statutory supervisors merely by vesting them with the title or job description of supervisor. Heritage Hall, 333 NLRB 458, 459 (2001). Likewise, an employer's holding out an individual to employees as a supervisor is not necessarily dispositive of supervisory status. Blue Star Ready-Mix Concrete Corp., 305 NLRB 429, 430 (1991). While it is well established that it is the possession of supervisory power rather than its exercise which determines supervisory status, it is equally well established that the grant of authority, which is in practice illusory because it is never exercised, is not sufficient to make an LPN a supervisor. Eventide South, 239 NLRB 287, fn. 3 (1978); Pine Manor Nursing Home, 238 NLRB 1654, 1655 (1978); North Miami Convalescent Home, 224 NLRB 1271, 1272 (1976).

With regard to the above-described authority, the record indicates that, in fact, LPNs are not permitted to perform some of the above-described duties, and in practice, do not perform others. For example, it is clear that LPNs cannot and do not suspend employees, interview applicants, orient new CNAs,¹⁵ authorize early departures from work, authorize overtime, reassign employees to other areas of the facility, issue DARs independently, or initial time records. With regard to the other “supervisory responsibilities” listed in the job description, these will be discussed herein in subsequent sections, because to determine whether the LPNs are supervisors, it is necessary to analyze how the LPNs actually carry out their responsibilities. Accordingly, I find that the mere recitation of supervisory duties listed in the job description is not indicative of their actual authority and responsibilities and therefore is not dispositive of the issue of the supervisory status of the LPNs.

¹⁵ The record reveals that LPNs do assist in the orientation of new LPNs, but not new CNAs.

B. Assignment And Direction Of Work

The Employer contends that the LPNs herein use independent judgment in the assignment and direction of work. Applying the legal standards set out above to the facts of this case and after a careful review of the record, I find that the LPNs do not utilize independent judgment in assigning and directing the work of the CNAs.

In reaching this conclusion, I note that the Board has held that “work assignments made to equalize employees’ work on a rotational or other rational basis are routine assignments” and that “assignments based on assessment of employees’ skills when the differences in skills are well known been have found routine”. Providence Hospital, 320 NLRB 717, 727 (1996). In the instant case, the LPNs receive the staffing sheet each day that indicates which CNAs will be working on their shift. These names rarely change, as most CNAs have bid on their shifts and, once they are awarded the bid, have the same assignment each work day. The LPNs have no role in deciding or contacting substitute CNAs when they are needed; this is done solely by the RN Supervisors.

With regard to the room assignments, the record is clear that the CNAs are assigned to the rooms based only on the number of CNAs and the number of residents. In fact, the record reflects that the Employer has instructed the LPNs to make the assignments on a purely mathematical basis. On those occasions when a substitute CNA is filling in, the group of residents normally assigned are not reconfigured. Rather, the substitute CNA usually takes the group of residents normally assigned to the regular CNA who is absent.¹⁶ Substituting a replacement CNA for an absent CNA is a merely ministerial task involving no exercise of independent judgment under the Act. See, e.g., Ten Broeck Commons, 320 NLRB 806, 810 (1996). If the wing is short-staffed, the LPN will try to equalize the assignments among the

¹⁶ On a few occasions, the LPN may pair a substitute CNA with a regular CNA if the substitute has little experience. However, this appears to be a rather rare occurrence as the record indicates that all of the CNAs are trained and are familiar with their job duties.

CNAs. The Board generally views assignments made to equalize work as not involving a degree of discretion sufficient to confer supervisory status. Bozeman Deaconess Hospital, supra, 322 NLRB at 1107; Providence Hospital, supra.¹⁷

The LPNs assign the breaks and meal periods to the CNAs, but there are only two times available to take them – early or late. The meals and breaks are thus routinely assigned according to the room assignments, and the decision is based solely on ensuring that there are enough CNAs remaining on the floor to handle the workload. The LPNs' assignment of breaks and meals thus requires no independent judgment; rather such decisions are simple and routine. NLRB v. Kentucky River Community Care, Inc., supra; Ten Broeck Commons, supra at 811.

The LPNs can also change the break times if resident needs require their attention. The Board has characterized the ability to delay breaks due to workload as “routine clerical judgment” and has determined that the performance of this function does not establish supervisory status. Azusa Ranch Market, 321 NLRB 811, 812 (1996). See also, Loyalhanna Care Center, 332 NLRB 933, 935 (2000). Moreover, I note that the CNAs often rearrange their breaks on their own as situations arise, and then inform the LPNs that they have made these changes. I also note that, to the extent the LPNs make any changes in the assignment of work tasks or breaks, such changes appear to be sporadic and infrequent. The Board has held that “isolated or sporadic exercise of authority is insufficient to establish supervisory status.” Byers Engineering Corp., 324 NLRB 740, 741 (1997), citing Bowne of Houston, 280 NLRB 1222, 1223 (1986).

¹⁷ In its brief, the Employer contends that LPNs change assignments based on patient acuity, CNA or resident preferences, and relative skill levels. However, I find that these assertions are not supported by examples of specific instances where this has been done. Rather, these were conclusionary statements made by DON Jordan, who is not on the wings on a regular basis to observe whether this is actually done. The evidence provided by the LPNs who testified at the hearing indicates that the assignments are primarily routine, and, at best, there are sporadic instances where a change is made. The Board has held that conclusionary statements made in testimony, without supporting evidence, do not establish supervisory status. Custom Mattress Mfg., Inc., 327 NLRB 111, 112 (1998); Sears, Roebuck & Co., supra.

The record also fails to show that the LPNs use independent judgment in directing the work of LPNs. The essential duties of the CNAs are to take care of elderly people who are no longer able to care for themselves. For the most part, such duties require little skill, are repetitive, and at times, are even unpleasant. Each day, the CNAs must perform the same care, in the same manner, for the same residents.

One of the responsibilities of the LPNs is to be sure that the CNAs are properly performing their jobs. If an LPN sees a resident who needs attending to, or a job that has not been completed properly, the LPN will call it to the attention of the CNA. It appears that the Employer has provided written policies regarding virtually every task performed by the CNAs, so that it is clear how each task should be performed. Thus, the LPNs only oversee the work performed by the CNAs as prescribed by the Employer's detailed policies.

This type of direction does not manifest the independent judgment required in Section 2(11) of the Act. To some degree, the greater skill and experience of the LPN may be involved as the LPN may more quickly recognize a situation that requires immediate attention. In other situations, the problems are usually quite obvious, such as when a resident is wet, needs to be dressed, and so forth. In any event, the Employer's policies govern the workday tasks in great detail. See, Ten Broeck Commons, supra, 320 NLRB at 811-812. Thus, the LPNs supervision and direction of the CNAs is narrowly circumscribed to giving rather general, routine directions to lesser skilled employees in order to maintain the quality of the CNAs' work. The Board has held that this type of authority is typical of that of the industrial straw boss or leadman, skilled employees with only limited authority, who are routinely excluded from the definition of supervisor. *Id.* In an analogous situation, the Board recently found that a maintenance foreman who distributed routine tasks and monitored the manner in which the tasks were performed was not a supervisor within the meaning of the Act. Pacific Beach Corp., 344 NLRB No. 140, slip op. at 2-3 (2005).

With regard to the instruction of CNAs by conducting an inservice, the record reflects that the decision to hold an inservice is made by the RN Supervisors. The LPN may discuss the need for an inservice. The RN Supervisor may decide to conduct an inservice, or may instruct the LPN either to conduct the service by a demonstration or by a written instruction. While the job description states that LPNs may conduct an inservice at their discretion, there was no evidence that LPNs actually make this decision without first consulting with an RN Supervisor.

Thus, as with the assignment of work, the direction of work as performed by the LPNs appears to be routine and lacking in the use of independent judgment.¹⁸ As described above, the manner in which specific job duties are performed is described in great detail in the policy manuals at the nurses' stations. The LPNs do not make decisions as to how the tasks are to be done; this is prescribed in the Employer's policies.¹⁹ I also note that, as described subsequently, the LPNs do not possess the authority to discipline the CNAs to whom the work is assigned, nor are the LPNs held accountable for the work performed by the CNAs.

Accordingly, based on the above and the record as a whole, I find that the Employer has failed to meet its burden under Kentucky River Community Care, Inc. of establishing that the LPNs herein assign and responsibly direct the work of the CNAs using independent judgment in a manner that confers supervisory status within the meaning of Section 2(11) of the Act.²⁰

¹⁸ At the hearing, the parties stipulated that LPN Marsha Murphy is a supervisor within the meaning of the Act inasmuch as she has the authority, using independent judgment, to assign and direct work. While there is little testimony regarding Murphy's assignment and direction of work, I note that she is the most senior LPN at the facility, with 22 years working there as an LPN. In addition to her regular duties as a charge nurse, Murphy has worked with management to develop assignment sheets and work schedules. Murphy has also assisted management in training the LPNs in the use of the forms she has developed, the use of which is now mandatory. I also note that the Employer has failed to establish that the other LPNs have the same authority in this regard as Murphy. Thus, I find that Murphy's authority regarding assigning and directing work is greater than that of the other LPNs at the facility.

¹⁹ In Providence Hospital, supra, 717 NLRB at 729, the Board held that Section 2(11) supervisory authority does not include the authority of one employee who directs another to perform discrete tasks stemming from that employee's experience, skills, training and so forth. This concept was noted but not specifically ruled upon by the Supreme Court in NLRB v. Kentucky River Community Care, Inc.

²⁰ In its brief, the Employer cites Integrated Health Services, 191 F.3d 703 (6th Cir. 1999) in support of its position regarding the assignment and direction of work. However, in that case, the nurses at issue had

C. Discipline

The Employer contends that the LPNs have the authority to discipline and therefore they are supervisors within the meaning of the Act . However, the record fails to establish that the LPNs have any role in the disciplinary process other than reporting possible misconduct. LPNs Stephanie Heeter, Crystal Neiswonger, Sally Wyant, Renee Guntrum and Vicki Hawke all consistently testified that, although the job description for LPNs states that they have the authority to issue Disciplinary Action Reports ("DARs"), the practice is that the LPN only reports to the RN Supervisor conduct that potentially could result in discipline. The RN makes the decision whether formal discipline should issue and what level, or whether the LPN should merely counsel the CNA either verbally or through the coaching/counseling forms.

Once the RN makes a decision that a DAR should be issued, the LPN is instructed to fill in the portion of the form describing the incident. The RN checks the individual's record to see

more discretion to change assignments, breaks and so forth than the LPNs in the instant case. Inasmuch as these cases are very fact-specific, I find this case unpersuasive. I also note that this case has not been followed by the Board since its issuance.

The Employer also relies on two cases involving barge lines, Alter Barge Lines, Inc., 336 NLRB 1266 (2001), and American Commercial Barge Line Co., 337 NLRB 1070 (2002), in support of its position. However, the pilots at issue in those two cases had much more extensive authority than the LPNs herein. The pilots, who were the responsible officials on the employers' towboats when they were on duty, had complete discretion to change employees' assignments, which often required swift and frequent changes due to weather, river traffic and other variables. The pilots also had the independent authority to relieve deck hands of their duties if they were not performing the tasks assigned. The pilots ran the towboats independently during their watches, and utilized their skills and experience to direct the deck hands in all aspects of the towboats' operations. Thus, they were not limited to directing their subordinates' performance of discrete tasks, as in Providence Hospital and the instant case. Accordingly, I find the above cases cited by the Employer to be distinguishable from the present case.

In addition, the Employer cites two Regional Director's Decisions in support of its position. However, in Harlan Nursing Home, Inc., Case 9-UC-462, unlike the present case, the nurses considered the skills and experience of the CNAs when making assignments, instead of merely dividing the room assignments equally. Rather, the LPNs assigned and reassigned the aides based on personnel related issues and to accommodate resident preferences. Additionally, unlike the present case, the CNAs in that case were required to inform the charge nurse when they were ready to take their breaks. Similarly, in Bon Harbor Nursing and Rehabilitation Center, Case 25-RC-10304, the LPNs had total discretion as to scheduling and changing breaks of CNAs and also had wide discretion in the assignment of tasks to be performed by the CNAs. Additionally, unlike the instant case, the LPNs in that case could independently write up a disciplinary report on an employee and were also authorized to send employees home for serious violations of the Employer's rules. Thus, I find that those two decisions are distinguishable from the instant case.

if any prior discipline has been given to the CNA, and then either fills in the appropriate level of discipline or else instructs the LPN as to what level of discipline should be marked on the form. The LPN is then required to meet with the CNA to present the form for the CNA's signature. However, the LPNs do not decide whether to issue discipline or what level of discipline should be issued.

DON Jordan testified that the prior disciplines of the CNAs are kept in a file cabinet in the RN Supervisors' office and that the LPNs have access to these records. However, it is clear from the testimony of the above mentioned LPNs that either they were unaware of this fact or did not believe they had the authority to look in the cabinet. The record reflects that the LPNs do not independently decide whether to impose discipline; they merely report a problem when it arises.²¹

Therefore, although LPNs can verbally counsel CNAs independently, their role in the discipline procedure is essentially reportorial in nature and is insufficient to confer supervisory status. The reports by LPNs do not necessarily result in discipline. The Board has consistently held that, for a charge nurse's supervisory status to be based on discipline, the discipline must lead to personnel action without independent investigation or review by other management personnel. Beverly Health & Rehabilitation Services, Inc., 335 NLRB 635, 669 (2001); Franklin Home Health Agency, supra, 327 NLRB at 830.²²

²¹ LPN Marsha Murphy testified that she has issued discipline without first discussing it with an RN. However, her testimony in this regard was general and she did not provide any specific examples of the exercise of this authority. In fact, when questioned about DAR forms signed by her, Murphy admitted that the forms in evidence were only signed by her but filled out by someone else. When further questioned, Murphy admitted that the discipline she recalls issuing independently may have occurred several years ago, while the examples of her disciplines from the last few years were all filled in partially by Murphy and partially by an RN Supervisor. Thus, Murphy's testimony does not contradict my finding that the Employer's present practice is that the LPNs do not independently issue formal discipline.

²² The Employer cites Wilshire at Lakewood, 345 NLRB No. 80 (2005), in support of its position that the LPNs' involvement in discipline confers supervisory status on them. However, I find that case is distinguishable from the instant one. In Wilshire at Lakewood, the nurse therein had the independent authority to write up a disciplinary form. This form was placed in the individual's file without any further review, constituting the first step of the discipline procedure. Moreover, in that case, the Board stated that it agreed with the precedent that merely reporting facts, without a recommendation, does not establish

Accordingly, based on the above and the record as a whole, I find that the Employer has not met its burden of establishing that the LPNs have the authority to discipline CNAs using independent judgment in a manner which would confer supervisory status on the LPNs.

D. Evaluations

The Employer asserts that the LPNs are supervisors within the meaning of the Act because they fill out evaluations of the CNAs who work with them. The record reflects that these evaluations do not affect the employees' wages or terms and conditions of employment.²³ The authority to evaluate is not one of the Section 2(11) indicia of supervisory status. Elmhurst Extended Care Facilities, Inc., 329 NLRB 535, 536 (1999). However, the Board has held that charge nurses are statutory supervisors when there is a correlation between the evaluations prepared by LPNs and the merit increases received by CNAs. Trevilla of Golden Valley, 330 NLRB 1377, 1378 (2000); Hillhaven Kona Healthcare Center, 323 NLRB 1171 (1997). When, on the other hand, the evaluation, by itself, does not affect the wages or the job status of the employee being evaluated, the individual preparing the evaluation will not be found to be a statutory supervisor on the basis of the evaluations. Franklin Home Health Agency, supra.

In the instant case, the evaluations are reportorial in nature and there is no record evidence that they have any effect on wages or continued employment. Accordingly, I find that the Employer has failed to establish that the preparation of evaluations in this matter is sufficient to confer supervisory status on the LPNs herein.²⁴

supervisory status. Wilshire at Lakewood, slip op. at 2. In the present case, the LPNs do not initiate any part of the disciplinary process unless and until they are instructed to do so by the RN Supervisor, after the LPN reports the facts of the situation. There was no evidence presented that the LPNs recommend any particular level of discipline when they report a situation. Thus, I do not find Wilshire at Lakewood dispositive of the matter herein.

²³ Inasmuch as the CNAs are represented by AFSCME, their wages and terms of employment are set forth in their collective-bargaining agreement.

²⁴ In its brief, the Employer cites two cases in support of its position that preparing evaluations is an indicia of supervisory status: Wilshire at Lakewood, supra, and Caremore, Inc. d/b/a Altercare of Hartville v. NLRB, 129 F.3d 365 (6th Cir. 1995). In Wilshire at Lakewood, the nurse therein wrote an evaluation which determined whether the employee had successfully completed his probationary period, Id., slip op.

E. Adjustment Of Grievances

The Employer asserts that the LPNs are statutory supervisors because they have the authority to adjust grievances. The record contains little information regarding the adjustment of grievances. The record did establish that LPNs have the authority to resolve minor disputes among nursing assistants or to listen to employees' minor complaints. However, there is no evidence that the LPNs play any role in connection with grievances filed pursuant to the collective-bargaining agreement. Rather, the DON conducts the first step meeting and is considered to be the immediate supervisor of all nursing department employees for purposes of invoking the contractual grievance procedure. In these circumstances, I conclude that the record evidence is insufficient to establish that the LPNs have the authority to independently adjust grievances. Northern Montana Health Care Center, 324 NLRB 752, 754 (1997); Riverchase Health Care Center, 304 NLRB 861, 865 (1991).²⁵

Accordingly, based on the above and the record as a whole, I find that the Employer has failed to establish that the LPNs have the authority to adjust grievances in a manner that would confer supervisory status within the meaning of the Act.

at 6. In Altercare of Hartville v. NLRB, the evaluation included a recommendation as to whether the individual's employment should be continued or terminated. Id. at 370. In the instant case, there is no evidence that the evaluations prepared by the LPNs have any effect on the employees' future employment or wages. Thus, I find those cases distinguishable from the instant one.

²⁵ Passavant Retirement & Health Center v. NLRB, 149 F.3d 243 (3d Cir. 1998), relied upon by the Employer in its brief, involved the nurses' resolution of complaints which could ripen into grievances cognizable under the collective-bargaining agreement covering the CNAs. In contrast, in the instant case, the LPNs are merely giving advice and suggestions rather than informally resolving disputes that would constitute contractual grievances. The LPNs herein refer the problem to the RN Supervisor if it is more than a minor, routine issue. In this regard, the court emphasized that the definition of "grievance" contained in the collective-bargaining agreement in that case was very broad and the agreement included sections pertaining to daily assignments, break times, lunch breaks and the like, matters which the nurses in Passavant could resolve and adjust when disputes arose among the aides with respect to these matters. In the instant case, there was no evidence that the kind of problems that LPNs might deal with relate to such matters. See Ken-Crest Services, 335 NLRB 777, 778-779 (2001) wherein the Board distinguished Passavant on the ground that the record therein indicated that the program directors alleged to be supervisors only offered advice and suggestions regarding personality conflicts. These are the same types of problems that the LPNs herein might address. I also note that the first step of the contractual grievance procedure provides that the grievant shall meet with the grievant's "immediate supervisor". For nursing department employees, that immediate supervisor is the DON. Thus, I find Passavant to be factually distinguishable from the present case.

III. FINDINGS AND CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.
3. The Petitioner claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time licensed practical nurses employed by the Employer at its Sligo, Pennsylvania, facility; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act, and all other employees.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by District 1199P, Service Employees International Union. The date, time and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees

engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Two Chatham Center, Suite 510, 112 Washington Place, Pittsburgh, PA 15219, on or before **December 30, 2005**. No

extension of time to file this list will be granted, except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at 412/395-5986. Since the list will be made available to all parties to the election, please furnish a total of **two (2)** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) full working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so precludes employers from filing objections based on non-posting of the election notice.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001.²⁶ This request must be received by the Board in Washington by 5 p.m., EST (EDT), on **January 6, 2006**. The request may **not** be filed by facsimile.

Dated: December 23, 2005

/s/Gerald Kobell

Gerald Kobell, Regional Director

NATIONAL LABOR RELATIONS BOARD
Region Six
Two Chatham Center, Suite 510
112 Washington Place
Pittsburgh, PA 15219

Classification Index
177-8580-8050

²⁶ A request for review may be filed electronically with the Board in Washington, D.C. The requirements and guidelines concerning such electronic filings may be found in the related attachment supplied with the Regional Office's initial correspondence and at the National Labor Relations Board's website, www.nlrb.gov, under "E-Gov."